Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WEST INDIES TRANSPORT (CO.), INC., WIT EQUIPMENT CO., INC., and W. JAMES OELSNER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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71 pp.

QUESTIONS PRESENTED

1. Whether, in view of the plain language of the Clean Water Act ("CWA"), its legislative history, and its interpretation by the courts, the individual act of severing portions of a vessel following a hurricane can constitute the discharge of a pollutant from a "point source" within the meaning of the CWA?

2. Whether the discharge of airborne sand and paint particles carried by wind over the water body in connection with the sandblasting of a vessel constitutes a point source discharge within the meaning of the CWA?

3. Whether a barge temporarily moored to shore that, if repaired, would be capable of being used as a means of transportation, constitutes a "vessel" as defined by the CWA?

4. Whether the failure of the jury to determine the question of materiality of petitioners' alleged false statements requires reversal of the convictions for visa fraud when the issue of materiality was contested at trial?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, W. James Oelsner, West Indies Transport, Inc., and WIT Equipment Co., Inc. (collectively "Oelsner"), request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on October 15, 1997, which affirmed 2-1 the convictions and sentences of the United States District Court of the Virgin Islands.

OPINIONS BELOW

The opinion of the Court of Appeals together with the dissenting opinion of Judge Nygaard, is reported at _F.3d_, 1997 U.S. App. Lexis 28593 (3d Cir. 1997). It is also reproduced in Appendix A at A-1-39.[1] The decision of the District Court is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1997. A timely petition for rehearing with a petition for rehearing en banc was denied on November 12, 1997. (Appendix C.) On November 24, 1997, the Court of Appeals issued a stay of the mandate until December 5, 1997. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1311(a) of the CWA provides:

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[1] References to the decisions below are designated parenthetically as "A" followed by the Appendix page number(s) on which the referenced material appears.

> the discharge of any pollutant by any person shall be unlawful.

Section 1319(c)(2)(A) of the CWA provides:

> Any person who-
> (A) knowingly violates Section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title ... shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation or by imprisonment for not more than 3 years, or by both ....

Section 1322(a)(1) of the CWA defines "new vessel" to include:

> every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters....

Section 1362(14) of the CWA defines "point source as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or

may be discharged.

STATEMENT OF THE CASE

Relevant Facts

Petitioner W. James Oelsner was the president of the now defunct West Indies Transport Co. ("WIT"). He is a 69 year old businessman with no prior involvement with the criminal justice system. WIT acted as agent for foreign principals who conducted drydocking and repair operations of their own vessels in St. Thomas, United States Virgin Islands, and operated a barge towing company.

In September of 1989, Hurricane Hugo devastated the island of St. Thomas, impacting every aspect of the foreign principals' operations. (A-4.) The hurricane severely damaged many of the WIT barges. (A-4.) The stern of one of the vessels -- the *WITConcrete II* -- had broken free and sunk to the bottom of Krum Bay, connected with the floating remainder of that vessel only by several pieces of rebar. (A-5.)[2]

After the hurricane, Antilles Marine Services Co., Inc., through Oelsner, attempted to repair the WIT facility and to salvage and rebuild the damaged WIT vessels. As part of that effort, the floating portion of the *WITConcrete II* was severed from the stern portion lying on the ocean floor and towed to St. Croix. Subsequently, at the request of the Virgin Island Port Authority, WIT secured United States Coast Guard and Virgin Island Government authorization to return the vessel to the WIT facility in Krum Bay, St. Thomas, and tugs were sent to retrieve the *WITConcrete II*. In closing the hull and preparing the vessel for safe towing -- as required by the Coast Guard --

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2 "Rebar" are metal rods used to reinforce concrete. The *WITConcrete II* was constructed of reinforced concrete.

additional rebar was cut from the stern portion in St. Croix's Krause Lagoon in June 1993. A portion of the rebar cut from the vessel fell into Krause Lagoon. (A-5.)

The post-hurricane activities also included the sandblasting and repair of another vessel. During the course of refurbishing this vessel, small amounts of sand and residue were blown into the air. (A-5.) In conducting scraping, sandblasting and repainting of the vessel's exterior, tarps were situated around the tug on drydock, and the residue was regularly swept, bagged and removed to a nearby trash receptacle. Nevertheless, some of the airborne paint chips and sand were carried by wind over the adjacent waterway and settled into the water.

Also as part of its salvage and repair operations, workers engaged in salvage operations slept in container berths provided within the damaged barge *WITRollon*. This vessel also contained kitchen and toilet facilities. While workers were housed on this vessel, sewage produced from the toilet on board was discharged into Krum Bay, prior to the connection of the toilet to a holding tank. (A-5.)

The workers -- who were non-U.S. citizens from the Philippines -- came to the Virgin Islands pursuant to contracts signed with one of WIT's foreign principals, Administration De Marinos, S.A. ("ADM"). These workers were qualified within the international maritime community as seamen. They entered the United States pursuant to special visas issued to them as seamen in the Philippines. Once they entered the United States, they performed salvage and repair work on ADM vessels. The workers were to ready the vessel and man it upon its return to operations after repairs.

The Proceedings Below

Oelsner was charged, along with WIT and WIT Equipment Co., in a twenty-one count indictment for visa fraud, environmental crimes, conspiracy, and a charge under the local RICO statute. (A-6.)

Count 1 alleged that the severing of the stern of the *WITConcrete II* constituted a knowing discharge of a pollutant from a point source in violation of the CWA. Count 2 alleged that the cutting of rebar from the *WITConcrete II*, some of which inadvertently landed into Krause Lagoon, also constituted a knowing discharge of a pollutant in violation of the CWA. Count 7 alleged that the airborne sand and paint chips that landed into the adjacent waterway as a result of petitioners' sandblasting activity also constituted a knowing discharge of a pollutant in violation of the CWA. Count 4 alleged that the discharge of untreated sewage from the *WITRollon* also constituted a knowing violation of the CWA.[3] Counts 13 through 19 alleged that petitioners engaged in "fraud and misuse of visas, permits and other documents," in violation of 18 U.S.C. § 1546(a), with regard to the visa applications by the Filipino workers contracted to work for ADM.

Prior to verdict, the district court dismissed counts 5-6, 10-11, and 20 were dismissed. After a jury trial, petitioners were convicted of the remaining counts. (A-6.) An appeal to the Third Circuit followed, and the majority in a 2-1 decision affirmed the convictions. Subsequently, Oelsner filed a petition for rehearing en banc which was denied by the Third Circuit on November 12, 1997. (Appendix C.)

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[3] The remaining counts, which are not the subject of this Petition, alleged violations of the Rivers and Harbors Act, the Ocean Dumping Act, and the Virgin Islands parallel to RICO.

Oelsner petitions this Court to grant certiorari to review the panel majority's decision regarding counts 1-2, 4, and 7 under the CWA, and counts 13-19 relating to the alleged visa fraud which affirmed the District Court's convictions and sentencing as to such counts.

REASONS FOR GRANTING THE WRIT

This Court should grant Oelsner's Petition for Writ of Certiorari ("Petition") in order to resolve a direct conflict among the circuits involving the interpretation of provisions in the CWA. The Third Circuit Court of Appeals and the Second Circuit Court of Appeals are in conflict over an important question concerning criminal enforcement of the CWA. This Petition would bring up for review an impermissible expansion of the criminal provisions of one of the most pervasive environmental statutes.

The Third Circuit has construed the definition of "point source" in the CWA to include conduct never contemplated by Congress, the United States Environmental Protection Agency ("EPA"), or any court interpreting this term. The overly broad construction of specific provisions in the CWA -- especially in the context of a criminal prosecution -- finds no support in the statutory language, legislative history, or case law. This construction by the majority below seriously undermines the credibility of criminal enforcement under federal environmental laws. Furthermore, if the Supreme Court refuses to grant Oelsner's Petition, future courts will be left without guidance in this area.

In addition, with regard to court 4, the Court of Appeals' interpretation of the definition of "vessel" in the CWA focused unduly on the actual use of the *WITRollon*, effectively reading out of the definition the language "capable of being used as a means of transportation." This interpretation was contrary to the long-standing reading of this term to

include the "residual capacity" of a vessel.

Finally, the Court of Appeals' decision relating to he conviction on the visa fraud counts misapplied this Court's recent decision in Johnson v. United States, ("Johnson"), __ U.S. __, 117 S. Ct. 1544 (1997). This Court should grant certiorari to provide important instruction to federal courts concerning whether the failure to permit the jury to determine the materiality of alleged false statements constitutes "plain error" when, as here, the issue of materiality was contested at trial.

In light of this circuit conflict, and the substantial importance of these issues of statutory interpretation, the Supreme Court should exercise its discretion and grant Oelsner's Petition.

I.

THE PANEL'S INTERPRETATION BELOW OF THE TERM "POINT SOURCE" IS CONTRARY TO THE INTERPRETATION BY THE SECOND CIRCUIT, FINDS NO SUPPORT IN THE CWA OR ITS LEGISLATIVE HISTORY, AND CONCERNS A MATTER OF SUBSTANTIAL IMPORTANCE

The Court of Appeals' decision below stands in direct conflict with another circuit's decision. Contrary to the Second Circuit's interpretation of the term "point source" in United States v. Plaza Health Laboratories, Inc. ("Plaza Health"), 3 F.3d 643 (2d Cir. 1993), cert. denied sub nom. United States v. Villegas, 512 U.S. 1245 (1994), the panel has expanded the scope of the CWA's point source provisions beyond a level ever intended by Congress. This split on a substantial question is deserving of Supreme Court review.

In a 2-1 decision, the majority affirmed petitioners' convictions on counts 1, 2, and 7, under the CWA, finding, in part, that the severing of the stern of the *WITConcrete II*, as well as the severing of rebar and attached concrete from the stern of the *WITConcrete II*, constituted the discharge of a "pollutant" from a "point source" pursuant to Section 1311(a) of the CWA. (A-14-15.) In an opinion written by Judge Anthony J. Scirica, the majority rejected petitioners' argument that the government had failed to establish that a pollutant was added to navigable waters from a "point source." (A-14-15.)

Central to the majority's holding below was its analysis of the CWA's definition of "point source," which defines that term in the following manner:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). The majority found that because the *WITConcrete II* qualified as a "vessel" or "other floating craft," the severing of the stern and rebar qualified as point source discharges. (A-17.)

Judge Nygaard's dissent, however, properly recognized that the severing of the *WITConcrete II*'s stern -- which was lying on the floor of Krum Bay after that portion of the vessel had been partially severed during Hurricane Hugo -- "was not a discharge <u>from</u> a vessel, as required by 33 U.S.C. § 1362(14). Rather, a part of the vessel itself was discharged." (A-36.) The dissent went on to properly characterize defendant's activities, noting that defendant:

> merely severed a wrecked, useless portion of the *Witconcrete II* to extricate a serviceable forward portion of it. This was a salvage operation, not a discharge of concrete and rebar through the instrumentality of the barge.

(A-36.)

Judge Nygaard's dissent properly recognized that the definition of point source has, as its central principle, the concept of a physical structure designed to collect or discharge pollutants in the course of waste-generating activity. (A-34 (citing Plaza Health, 3 F.3d at 646-47).) While a vessel or floating craft are surely capable of being used as a mechanism for discharging pollutants, the *WITConcrete II* was not utilized in such a manner. The barge did not convey pollutants into the water, but rather part of the vessel itself remained in Krum Bay after the stern was severed. Similarly, "the severed rebar was not discharged through the 'conveyance' of the barge, see 33 U.S.C. § 1362(14), it was part of the barge itself." (A-37.)

In Plaza Health, -- a case that Judge Nygaard found to fit the facts of the instant case "particularly well," (A-34) -- the Court of Appeals for the Second Circuit also examined the application of the definition of point source in the criminal context. The Court held that the defendant could not be prosecuted under the CWA because the individual dumping of waste directly into a body of water was not a point source within the meaning of the Act. 3 F.3d at 646. In that case, the defendant loaded vials of contaminated blood into his car and dumped them into the Hudson River. Id. Despite the majority's creative efforts to distinguish Plaza Health, that decision is irreconcilable with the panel's holding in the instant case.

In reaching its decision, the Plaza Health court observed that the CWA "was never designed to address the random

individual polluter," and noted that:

> the words used to define the term [point source] and the examples given . . . evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways.

Id. at 645-46. The court also reasoned that an interpretation which brings every act of "discharge involving humans" within the ambit of the term point source would make the provision redundant and hence contrary to established principles of statutory construction. Id. at 647. The Court stated that it could not "make the further leap of writing 'human being' into the statutory language without doing violence to the language and structure of the CWA." Id. at 649.

The Plaza Health court also examined the legislative intent and found:

> no suggestion either in the act itself or in the history of its passage that Congress intended the CWA to impose criminal liability on an individual for the myriad, random acts of human waste disposal....

Id. at 647. The court concluded that:

> [a]dopting the government's suggested flexibility for the definition would effectively read the 'point source' element of the crime out of the statute, and not even the EPA has extended the term 'point source' as far as is urged here.

Id. at 649.

Contrary to the ruling in Plaza Health, the Court of Appeals For The Third Circuit has departed from this understanding and interpretation of point source and has affirmed Oelsner's convictions for precisely the type of conduct which the Second Circuit found to be outside the scope of the CWA's point source provisions. In the instant case it was not the vessel that conveyed any "pollutant" into Krum Bay or Krause Lagoon, but, at most, the individual human act of severing the stern or severing the rebar that left the material in the water. The barge in question did not convey pollutants into the water, but rather part of the vessel itself remained in Krum Bay after the stern was severed, nor was the severed rebar discharged through the conveyance of the barge; it was part of the barge itself.[4] (A-37.)

Similarly, the human activity of sandblasting paint from a ship near water -- the subject of Count 7 -- cannot constitute a point source discharge. Nevertheless, the majority disregarded the Second Circuit's well-reasoned application of the CWA's point source provisions in a criminal context. The

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[4] The notion of a discharge suggests that it is illogical to have something that existed in navigational water by its very nature become the basis for a criminal enforcement action when part of it is severed from the whole. This result is contrary to an analogous line of cases which hold that "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." National Wildlife Federation v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982). Furthermore, EPA believes that "the point or nonpoint character of pollution is established when the pollutant first enters navigable water...." Id. This analysis of the "addition of a pollutant" appears to exclude the activity alleged in the case at hand from the scope of the CWA's point source provisions.

majority identified the barge, upon which the sandblasting occurred, as the point source. (A-14-15.) Yet nowhere did the majority ever explain how the barge served as the conduit for conveying sand and paint debris into the water. This unwarranted expansion of the term "point source" not only departs from established principles of statutory construction, eviscerating the language of the CWA, but highlights a stark difference among the circuits over the proper scope of the CWA's point-source provisions.

A conflict among the circuits on an important matter provides a compelling reason for this Court to grant certiorari. Supreme Court Rule 10(a). Indeed, this Court has stated that a principal purpose for which the Supreme Court uses its certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals concerning the meaning of provisions of federal law. Braxton v. United States, 500 U.S. 344, 347 (1991). The panel's decision in this case has produced a split amongst the circuits regarding the application of certain CWA provisions. Given the irreconcilable nature of these decisions and the difficulty that future courts will face applying these precedents, Oelsner requests that this Court exercise its judicial discretion and grant certiorari.

II.

THE THIRD CIRCUIT'S REFUSAL TO RECOGNIZE THE LONG-STANDING DEFINITION OF A "VESSEL" UNDER FEDERAL LAW AND ITS INTERPRETATION BY THIS COURT AND OTHERS HAS CREATED PRECEDENT THAT LEAVES FUTURE COURTS WITHOUT ADEQUATE GUIDANCE

This Petition also presents an important question of federal law that has not, but should be, settled by this Court.

The Court of Appeals has badly misinterpreted the term "vessel," which will have far reaching impact in courts' application of that term in the CWA, and other federal statutes containing that definition.[5] In order to provide future courts with necessary guidance on the interpretation of specific CWA provisions, this Court should grant certiorari and reverse the holding below of the panel's majority.

Ignoring the plain language of the CWA, the panel affirmed Oelsner's conviction on count 4 for discharging untreated sewage into Krum Bay from the *WITRollon* in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A). (A-16-17.) Although the panel properly recognized that "if defendants' barge falls within the statutory definition of 'vessel,' the conduct in question does not violate §§ 1311(a) and 1319(c)(2)(A) and their convictions must be reversed," it concluded that the *WITRollon* was not a vessel because it "was moored permanently to shore." (A-17.) This conclusion is based on an erroneous interpretation of the term "vessel" in the CWA, which is contrary to the long-standing interpretation of that term by this Court and courts in several circuits.[6] Accordingly, this error provides an additional basis for the Supreme Court to grant certiorari and reverse the holding of the panel.

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[5] E.g., 1 U.S.C. § 3 (containing identical definition of "vessel" as in CWA); Compare 46 U.S.C. § 688 (Jones Act allowing recovery by seamen for vessels in "navigation).

[6] The Panel's conclusion is directly contradicted by the evidence at trial where the prosecution itself referred to the *WITRollon* as a "vessel." Indeed, the dissent, in reference to Count 3, noted that the barges were placed in their current location by the hurricane, not by WIT. (A-37.)

The panel's discussion of the term "vessel" ignored the clear language of Section 1322(a) of the CWA. That definition defines vessel to include:

> every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters....

33 U.S.C. § 1322(a)(1); 40 C.F.R. § 110.1 (emphasis added).

The panel's interpretation places too much emphasis on the actual use of the *WITRollon*, eradicating the language "capable of being used as a means of transportation" from this definition. It is the presence or absence of this "residual capacity" to be used as a means of transportation upon which many other courts have focussed in determining whether a craft is a "vessel." McCarthy v. The Bark Peking, 716 F.2d 130, 134 (2d Cir. 1983), cert. denied sub nom. South Street Seaport Museum v. McCarthy, 465 U.S. 1078 (1984). See Eastern Transport Co. v. United States, 272 U.S. 675, 692-93 (1927) (sunken barge constitutes a vessel); Tucker v. Alexandroff, 183 U.S. 424, 438 (1902) ("A ship is born when she is launched and lives so long as her identity is preserved").

The use of the *WITRollon* for housing and storage did not affect its capacity as a vessel and was consistent with its original function. Indeed, numerous courts have found barges and other special purpose structures capable of transportation to be vessels pursuant to the definition set forth in the general provision of the United States Code, 1 U.S.C. § 3, which contains the identical definition of vessel as the CWA, even where the primary function of such structures is not transportation. E.g., Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 755-56 (2d Cir. 1975) (floating crane); Producers Drilling Co. v. Gray, 361 F.2d 432, 437 (5th Cir. 1966) (barge submerged and in use as a drilling vessel deemed vessel);

Offshore Co. v. Robison, 266 F.2d 769, 779 (5th Cir. 1959) (drilling barge); Hudson Harbor 79th Street Boat Basin, Inc. v Sea Casa, 469 F. Supp. 987 (S.D.N.Y. 1979) (floating houseboat); Vol. I, Benedict on Admiralty, Friedel, §§ 164, 166 at note 2.

The two cases relied upon by the majority involved instances where it was clearly established that the vessel was permanently moored and permanently converted to another non-transportation use. For example, Kathriner v. Unisea, Inc., 975 F.2d 657 (9th Cir. 1992), involved a former ship whose hull had been converted into a floating fish processing plant. Id. at 659. The ship was hooked up to city sewers and water mains, telephone lines and cable television. Id. The engine, engine controls and all navigational equipment had been ripped out. Similarly, Cope v. Vallette Dry Dock Co., 119 U.S. 625, 627 (1887), involved a former vessel that had been permanently altered in a manner so that it was no longer capable of being used as a means of transportation.

The majority cited to no cases, however, where a court found that a barge like the *WITRollon*, whose hull was damaged, but capable of repair, did not qualify as a vessel under the relevant definition. There is no evidence in the record that the *WITRollon* was permanently moored, or that its condition had been so altered to eliminate its capability for use as a means of transportation. Rather, the Court focused on its present use to house workers, and that the barge was "half submerged" to justify its conclusion. (A-17.) Petitioners, on the other hand, had submitted evidence demonstrating that, with minor repairs to its hull, the *WITRollon* was capable of being used as a means of transportation.[7]

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[7] Indeed, a barge of that type, subdivided into several compartments, may float with only some that are airtight or by severing those compartments that are not.

If the Court's interpretation of the term vessel is permitted to stand, ships and other watercraft could shift intermittently between being a "vessel" or "non-vessel" under the CWA, depending on whether the watercraft is capable of being used as a means of transportation at that precise moment in time. Such a scheme would subject vessels to varying regulatory standards at different times and would thus be unduly burdensome and confusing for owners and operators of vessels, as well as for the regulators who would have to write permits for any vessel that was moored and undergoing some type of repair. There is no support in the CWA, its legislative history or applicable case law that Congress intended such a shifting regulatory scheme based on the specific "seaworthiness" of individual vessels.

This departure away from established interpretations of the CWA and the impractical results of such a holding provide another basis for the Supreme Court to grant certiorari. Accordingly, Oelsner requests that this Court recognize the important nature of this Petition and resolve this question regarding the proper scope and application of one of our nations most significant environmental laws.

III.

THE THIRD CIRCUIT FAILED TO RECOGNIZE A CRITICAL DISTINCTION BETWEEN THE FACTS OF THIS CASE AND THOSE PRESENTED IN *UNITED STATES V. JOHNSON* WHICH HAS CREATED A HOLDING THAT IS CONTRARY TO OTHER CIRCUITS

The Court of Appeals' decision relating to the visa fraud convictions (Counts 13 through 19) misinterprets recent Supreme Court precedent. As set forth below, this decision is contrary to the holdings of other courts on similar facts. Accordingly, this Court should grant certiorari and reverse the decision of the panel.

The Court of Appeals, purportedly basing its holding in part on this Court's decision in Johnson, supra, ignored a critical distinction between the facts of that case and those presented here. The Supreme Court's holding in Johnson, was premised on the Court's recognition that the issue of "[m]ateriality was essentially uncontroverted at trial...." 117 S.Ct. at 1546. There, the petitioner failed to present any plausible argument as to her statements' materiality.

In this case, however, materiality was contested. Petitioners argued and attempted to offer evidence that their failure to provide further information as to foreign crew activities would not have been "material" because the alleged false statements made on the workers' visa applications would not have altered the determination to allow these workers to enter United States territory. Indeed, the government called its own witness to rebut that assertion.

This distinction is significant because, in cases similar to this one, where materiality was contested at the trial below,

several appellate courts have held that the failure of the jury to determine the issue of materiality was sufficient to satisfy the plain error test and thus warranted a reversal of conviction. United States v. David ("David"), 83 F.3d 638, 648 (4th Cir. 1996) (Conviction vacated where defendant maintained at trial and on appeal "that materiality was not ultimately proven..."); United States v. Baumgardner ("Baumgardner"), 85 F.3d 1305 (8th Cir. 1996) (Where both definition and sufficiency of evidence to support materiality element were questioned at trial, conviction for false statement vacated).

In the instant case, the panel properly determined that, pursuant to the holding in United States v. Gaudin ("Gaudin"), 515 U.S. 506 (1995), the issue of the materiality of petitioners' alleged false statements should have been decided by the jury, rather than by the district court. The panel, however, found that the petitioners could not satisfy the "substantial rights" prong of the plain error test enunciated by this Court in United States v. Olano ("Olano"), 507 U.S. 725 (1993).[8] The panel held that the petitioners failed to point to "any facts suggesting that a jury might have reached a conclusion different from the district court on materiality" and had "presented no evidence at trial that their statements were not material." (A-9.)[9] The

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[8] Olano provides that before an appellate court may correct an error not raised at trial pursuant to Rule 52 of the Federal Rules of Criminal Procedure, "there must be (1) error, (2) that is plain, and (3) that 'affect[s] substantial rights.' If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings." Johnson, 117 S. Ct. at 1549 (citing Olano, 507 U.S. at 732).

[9] The Court also noted that the government had (continued...)

panel also found that, whether or not the substantial rights prong was satisfied, petitioners in any event did not satisfy the final prong of the Olano test -- that the error seriously affects the fairness, integrity or public reputation of the judicial proceedings. The panel's determination, however, was based on the erroneous finding that the issue of materiality had not been disputed below.

The panel's finding was primarily based upon the holding of the United States Supreme Court in Johnson, supra. The facts of Johnson, however, are far afield of this case. In Johnson, the defendant had been prosecuted for perjury relating to her testimony concerning the source of money utilized to make certain improvements to her home. 117 S.Ct. at 1547. The defendant in that case, Joyce Johnson, denied that the money had come from her boyfriend, who had been accused of drug trafficking and claimed that the money had been given to her mother by one Gerald Talcott in 1985. Id. The government, however, established that Talcott had died several years prior to the time that Johnson claimed he had given her mother the cash. Id.

After Johnson was convicted, but prior to her appeal, the United States Supreme Court decided Gaudin, supra. Applying Rule 52, as outlined in Olano, supra, the Court found that the first two prongs of the test had been satisfied. With regard to the third prong, whether the error impacted "substantial rights," the Court declined to determine whether the failure to have the jury determine the issue of materiality constituted a "structural error," which is an error that cannot be corrected under Rule 52 regardless of the impact on the outcome of the trial. Id. at 1550.

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[9](...continued)
introduced substantial evidence proving the appellants' representations were material. (A-9-10.)

Instead, the Court determined that:

> even assuming that the failure to submit materiality to the jury 'affect[ted] substantial rights,' it does not meet the final requirement of Olano . . . whether the forfeited error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Id. (quoting Olano, 507 U.S. at 736 [brackets in original].) This ruling, however, was based upon petitioner's failure to present a:

> plausible argument that the false statement under oath for which she was convicted -- lying about the source of the tens of thousands of dollars she used to improve her home -- was somehow not material to the grand jury investigation.

Id.

Here, the Third Circuit found that, as in Johnson, supra, the evidence of materiality was "overwhelming and uncontroverted." (A-10.) That conclusion, however, ignored appellants' defense, presented at trial, that asserted that the representations made on the visa applications were in accordance with the Immigration and Naturalization Service ("INS") practice of permitting workers to enter United States territory to perform work on vessels of their employers, including drydocking activities. Thus, the appellants clearly argued that their failure to provide further information as to appellants' activities would not have been "material" because such information would not have affected the government's decision to permit these foreign workers to enter United States territory.

The district court, moreover, refused to allow the jury to determine whether the additional information would have impacted the INS's determination. Instead, the district court, not the jury, determined as a matter of law that appellants "did not give to the INS, when such contacts were made, the full elements, the full story of what was being done." (A-26-27.)[10]

As a result of the panel's misapplication of Johnson, very different holdings have resulted from similar factual circumstances. David, supra; Baumgardner, supra. Given this split in authority and the misapplication of Supreme Court precedent, this Court should grant certiorari and reverse the panel's holding.

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[10] The court's determination was framed as a rejection of appellants' "entrapment by estoppel" argument. (A-26-27, n.14.) The district court's ruling, however, had the effect of denying appellants an opportunity to further contest the materiality of any alleged misrepresentations, and thus constituted "plain error."

CONCLUSION

For all the foregoing reasons, this Court should grant Oelsner's petition for writ of certiorari.

Dated: New York, New York
December 4, 1997

Respectfully submitted.

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APPENDIX

APPENDIX A

Filed October 15, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA
v.
WEST INDIES TRANSPORT, INC.,
Appellant at No. 96-7063
WIT EQUIPMENT CO., INC.,
Appellant at No. 96-7064
W. JAMES OELSNER, Appellant at No. 96-7065

On Appeal from the District Court of the Virgin Islands
Division of St. Croix.
(D.C. Criminal Nos. 93-cr-00195-1,
93-cr-00195-2 and 93-cr-00195-3)

Argued December 9, 1996,
Before: SCIRICA, NYGAARD and McKEE, Circuit Judges

(Filed October 15, 1997)

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OPINION OF THE COURT

SCIRICA, Circuit Judge.

Defendants West Indies Transport, Inc., WIT Equipment Co., and W. James Oelsner appeal their convictions and sentences for visa fraud, environmental crimes, conspiracy, and racketeering. The district court had jurisdiction under *48 U.S.C. § 1612*[1] and *18 U.S.C. §§ 3231* and 3241.[2] We have

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[1] *48 U.S.C. § 1612*(a) provides, in part: "The District Court of the Virgin Islands shall have the jurisdiction of a District court of the United States . . . ."

48 U.S.C. § 1612(c) provides, in part: "The District Court of the Virgin Islands shall have concurrent jurisdiction with the

(continued...)

jurisdiction under *28 U.S.C. § 1291.*[3] We will affirm.[4]

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[1](...continued)
courts of the Virgin Islands established by local law over those offenses against the criminal laws of the Virgin Islands, whether felonies or misdemeanors or both, which are of the same or similar character or part of, or based on, the same act or transaction or two or more acts or transactions connected together or constituting part of a common scheme or plan, if such act or transaction or acts or transactions also constitutes or constitute an offense or offenses against one or more of the statutes over which the District Court of the Virgin Islands has jurisdiction pursuant to subsections (a) and (b) of this section."

[2] *18 U.S.C. § 3231* provides, in part: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

18 U.S.C. § 3241 provides: "The United States District Court for the Canal Zone and the District Court of the Virgin Islands shall have jurisdiction of offenses under the laws of the United States, not locally applicable, committed within the territorial jurisdiction of such courts, and jurisdiction, concurrently with the district courts of the United States, of offenses against the laws of the United States committed upon the high seas."

[3] 28 U.S.C. § 1291 provides, in part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

I. Facts and Procedural History

West Indies Transport, Inc. and WIT Equipment Co. (collectively "West Indies Transport") operated several businesses in Krum Bay, St. Thomas, including a dry dock, ship repair facility, and barge towing company. West Indies Transport's chief operating officer was W. James Oelsner. In 1987, West Indies Transport obtained permits to use five barges as fixed docks for its other vessels. In 1989, Hurricane Hugo seriously damaged some of these barges, shifting them from their permitted positions. West Indies Transport did not attempt to repair, reposition, or salvage these barges after the storm. Instead, it used these barges as docks, repair facilities, and housing for employees in their new unauthorized locations. In the process, West Indies Transport attached the barges permanently to shore, constructed walkways and ramps between the barges for use by vehicles and employees, and wired them for electricity.

To staff its facilities, West Indies Transport hired an overseas agent to recruit Filipino workers. The Filipino workers were instructed to apply for D-1 visas intended for non-immigrant foreign maritime crewmen, not the H-2 visas required by law. The "West Indies Transport crewmen" never put to sea. Instead, West Indies Transport housed them in a converted shipping container on a barge and used them as dock workers. The Filipino workers were paid approximately $400 per month for a 56-hour work week. By using underpaid illegal foreign employees, West Indies Transport was able to reduce significantly its expenses for wages and wage taxes.

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[4](...continued)

[4] In some instances, it is difficult for us to ascertain the precise basis of the defendants' claims for relief. We have construed defendants' brief in the most plausible fashion.

In the course of its repair operations, West Indies Transport discharged several different pollutants into the navigable waters of the United States. Witconcrete II, a ferro-concrete barge, was heavily damaged in Hurricane Hugo. The stern was partially severed from the remainder of the barge, attached only by metal reinforcing bars, known as rebar. West Indies Transport did not attempt to repair, break up, or salvage the damaged stern. Instead, it cut the rebar by which the stern was attached and dumped the stern into the bay. Later, when West Indies Transport decided to move the barge, it cut additional protruding pieces of rebar from the structure and dumped them in the water. West Indies Transport also sand-blasted the hull of a vessel moored in its facility, causing paint chips and sand to fall into Krum Bay near the main water intake for the St. Thomas desalinization plant. The toilet system on the Witrollon, the barge on which illegal Filipino workers were housed, discharged raw sewage directly into the bay. West Indies Transport also collected steel scrap from its repair operations and dumped it twelve miles out at sea under cover of darkness. West Indies Transport never obtained a permit for any of these pollution discharges.

Defendants were charged in a twenty-one count indictment for visa fraud, environmental crimes, conspiracy, and racketeering. Five counts were dismissed on motion of the government. A jury found defendants guilty on the remaining sixteen counts. Defendants moved for post-verdict judgment of acquittal, which the district court denied. This appeal followed.

II. Visa Fraud

A.

Defendants were convicted of aiding and abetting visa fraud

in violation of *18 U.S.C. § 2* and *18 U.S.C. § 1546.*[5] At trial, the district court instructed the jury that defendants' representations to U.S. immigration and State Department officials verifying that Filipino workers hired by West Indies Transport would be working as crewmen aboard foreign flagged vessels were material as a matter of law. These instructions were consistent with our decision in *United States v. Greber, 760 F.2d 68* (3d Cir.), cert. denied, *474 U.S. 988, 88 L. Ed. 2d 348, 106 S. Ct. 396 (1985),* which held that when a defendant is tried for perjury the issue of materiality is decided by the court.

Between verdict and sentencing, the United States Supreme Court held that on a perjury charge under *18 U.S.C. § 1001,* materiality must be submitted to the jury. *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995).* "The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial court's refusal to allow the jury to pass on the materiality

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[5] 18 U.S.C. § 1546 provides, in part: "Whoever knowingly makes under oath, or . . . knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing such statement -- Shall be fined under this title or imprisoned not more than five years, or both."

18 U.S.C. § 2 provides: "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

of Gaudin's false statements infringed that right." *115 S. Ct. at 2320.*

The rule announced in Gaudin applies retroactively to this direct appeal. *Johnson v. United States, U.S. , 137 L. Ed. 2d 718, 117 S. Ct. 1544, 1549 (1997)* (Gaudin applies retroactively on direct review; citing *Griffith v. Kentucky, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987)).* Defendants contend that Gaudin requires a new trial.

Defendants submitted to the district court proposed jury instructions which took the issue of materiality away from the jury, but now object to those same instructions. For this reason, the government asks us to treat the district court's instructions as non-reviewable invited error, under *United States v. Console, 13 F.3d 641 (3d Cir. 1993),* cert. denied, *513 U.S. 812 (1994)* and *Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767 (3d Cir. 1975).* We decline to do so. Where a defendant submits proposed jury instructions in reliance on current law, and on direct appeal that law is declared constitutionally infirm, we will not apply the invited error doctrine. Instead, we will review for plain error under Fed. R. Crim. P. 52. See *Johnson, 117 S. Ct. at 1548-49* (reviewing Gaudin error under plain error standard where defendant, relying on current law later declared unconstitutional, insisted at trial that materiality was an issue for the court, not jury, to decide). Under Rule 52, "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of the judicial proceedings." *Johnson, 117 S. Ct. at 1549* (internal quotations and brackets omitted; citing *United States v. Olano, 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)).* As the Supreme Court explained in Johnson, "in a case such as this -- where the law at the time of trial was settled and clearly

contrary to the law at the time of appeal -- it is enough that an error be 'plain' at the time of appellate consideration." Id. See also *United States v. Retos, 25 F.3d 1220 (3d Cir. 1994)* (question is not whether error was plain at time of trial, but whether it is plain based on current law at time of direct appeal).

Failure to submit the issue of materiality to the jury was error. *Gaudin, 115 S. Ct. at 2320; Johnson, 117 S. Ct. at 1549.* That Gaudin involved perjury under *18 U.S.C. § 1001* rather than *18 U.S.C. § 1546*, the relevant statute here, is not significant given the identical character of the materiality element in both perjury statutes. See *Johnson, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997)* (applying Gaudin to case involving perjury under *18 U.S.C. § 1623); United States v. DiRico, 78 F.3d 732 (1st Cir. 1996)* (applying Gaudin to perjury under *26 U.S.C. § 7206*(1)).

A "plain" error is an error which is "clear" or "obvious." *Johnson, 117 S. Ct. at 1549; Olano, 507 U.S. at 734.* Failure to send the issue of materiality to the jury is, in light of Gaudin, obvious or clear and therefore "plain" error. *Johnson, 117 S. Ct. at 1549.*

To satisfy the "substantial rights" prong of the plain error test, defendants usually must show that the error was "prejudicial" -- "It must have affected the outcome of the district court proceedings." *Olano, 507 U.S. at 734; United States v. Turcks, 41 F.3d 893* (3d Cir.) (same), cert. denied, *514 U.S. 1074, 131 L. Ed. 2d 575, 115 S. Ct. 1716 (1994).*[6]

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[6] In Olano, the Supreme Court suggested that there might be a "special category" of structural errors that can be corrected under Rule 52 regardless of their effect on the outcome of the trial, 507 U.S. at 735, but did not state what types of cases

(continued...)

Defendants bear this burden of proof. Id. Defendants here have not brought to our attention any facts suggesting that a jury might have reached a conclusion different from the district court on materiality. Defendants presented no evidence at trial that their statements were not material. More importantly, the government introduced substantial evidence proving the defendants' representations were material. Indeed, had immigration officials known the true facts behind the Filipino workers' applications for visas -- defendants' intention to employ as dock workers illegally underpaid foreign workers housed permanently on derelict barges -- the visas never would have been granted. For these reasons, defendants have not met their burden of proving that the failure to submit the issue of materiality to the jury affected the outcome of the trial. See *United States v. Kramer, 73 F.3d 1067* (11th Cir.) (Gaudin error not reversible plain error; defendant failed to show that error affected outcome of trial), cert. denied, *136 L. Ed. 2d 405, 117 S. Ct. 516 (1996); United States v. Ross, 77 F.3d 1525 (7th Cir. 1996)* (Gaudin error not reversible plain error; issue of materiality not seriously disputed at trial).

"When the first three parts of Olano are satisfied, an appellate court must then determine whether the forfeited error

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[6](...continued)
might fall under this special category. In *Johnson, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997),* the Supreme Court declined to address whether a Gaudin error falls within this category. Our ruling in *Retos, 25 F.3d 1220,* assumed but did not decide that this "special category," whatever its content, does not include cases where the district court failed to instruct the jury on an essential element of the offense. We agree with that assumption. But see *United States v. David, 83 F.3d 638 (4th Cir. 1996)* (failure to send issue of materiality to jury falls within "special category" noted by Supreme Court in Olano; reversal required regardless of effect on outcome).

seriously affects the fairness, integrity, or public reputation of judicial proceedings before it may exercise its discretion to correct the error." *Johnson, 117 S. Ct. at 1550* (internal quotations and brackets omitted). Whether or not their substantial rights were affected, defendants have not satisfied the fourth prong of the Olano test. In Johnson, a case involving similar facts, the Supreme Court observed that the evidence of materiality was "overwhelming," materiality was "essentially uncontroverted at trial," and the defendant had presented "no plausible argument" that her false statements were "somehow not material." Id. The Supreme Court concluded: "On this record there is no basis for concluding that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. Indeed, it would be the reversal of a conviction such as this which would have that effect. . . . No miscarriage of justice will result here if we do not notice the error, and we decline to do so." Id. (internal quotations omitted).

In the same manner, the evidence at trial that West Indies Transport's representations were material was overwhelming and uncontroverted. On appeal, defendants have not presented a plausible argument that their statements were not material. The failure to submit materiality to the jury did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. For these reasons, we will affirm the convictions on visa fraud.

B.

Defendants contend their convictions for aiding and abetting visa fraud must be reversed because the district court did not instruct the jury that it must find "knowing subscription" or "knowing presentation" of false material. Not only did defendants fail to request such an instruction, their proposed instruction was remarkably similar to that actually delivered by

the district court.[7] "Thus, if there was any error at all, it was 'invited error' and cannot now be a basis for reversal." *United States v. Console, 13 F.3d 641, 661 (3d Cir. 1993)* (quoting *Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975))*, cert. denied, *513 U.S. 812 (1994)*.

C.

Defendants contend as a matter of law they could not be convicted of aiding and abetting visa fraud because the government conceded that immigrant workers who presented false information to the INS at West Indies Transport's instigation lacked criminal intent. We review de novo where the question is one of statutory interpretation. *United States v. Schneider, 14 F.3d 876 (3d Cir. 1994)*.

The aiding and abetting statute provides, inter alia, that a defendant is liable if he willfully causes an act to be done by another which would be illegal if he did it himself. *18 U.S.C. § 2*(b). For this reason, whether the immigrant workers lacked criminal intent is irrelevant so long as West Indies Transport intentionally caused them to submit false information. As the Court of Appeals for the Eleventh Circuit explained, "it is well established that § 2(b) was designed to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged." *United States v. Tobon-Builes, 706 F.2d 1092, 1099* (11th Cir.), reh'g denied, *716 F.2d 914 (1983)*. See also *Springs v. First Nat. Bank of Cut Bank, 835*

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[7] Compare defendants' proposed instruction, requiring the jury to find that "knowing false statement be made" to the government, SA 1140, with actual instruction used, which required the jury to find that false statements were "made" and that the defendants "knew" that they were false, A 981.

F.2d 1293 (9th Cir. 1988) ("A person who causes the commission of an offense is punishable as a principal even though the person who commits the wrongful act violates no criminal statute because of lack of criminal intent or capacity.").

In *United States v. Catena, 500 F.2d 1319* (3d Cir.), cert. denied, *419 U.S. 1047, 42 L. Ed. 2d 641, 95 S. Ct. 621 (1974),* a physician was convicted for presenting false Medicare claims to the United States. On appeal, the physician argued that his conviction must be overturned because he did not present the claims to the United States in person. Rather, he submitted the false claims to two insurance companies, which forwarded them to the United States government. We affirmed his conviction, observing that under " § 2(b) a person may be convicted of causing a false claim to be presented to the United States even though he uses an innocent intermediary (in this case the insurance carriers) to actually pass on the claims to the United States." *Id. at 1323.*

The Court of Appeals for the Ninth Circuit reached the same conclusion in *United States v. Causey, 835 F.2d 1289 (9th Cir. 1987).* In Causey, a tax protester was convicted for aiding and abetting tax evasion by helping persons file false tax returns. On appeal, he argued the government failed to prove that the persons actually submitting the false returns possessed criminal intent. The court rejected this argument "because it is immaterial to Causey's conviction whether or not the taxpayers were shown to have intended to file false tax returns." *Id. at 1291.* "Under section 2(b) . . . the government need not prove that someone other than the defendant was guilty of the substantive crime. A person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of intent or capacity . . . . Whether the taxpayers had guilty knowledge in submitting the claims becomes irrelevant under section 2(b)." *Id. at 1291.*

West Indies Transport's arguments are indistinguishable from those rejected in Catena and Cause. When a defendant uses an innocent intermediary to present false claims or make false statements to the government, the criminal intent of the intermediary is not an element of the offense. *18 U.S.C. § 2*(b). For this reason, the district court's charge was not erroneous.

III. Environmental Crimes

A.

Defendants were convicted of violating the Clean Water Act, *33 U.S.C. § 1251* et seq., by (1) severing a 250-ton concrete and rebar block from the stern of Witconcrete II, a ferrous concrete barge, and dumping it into Krum Bay, St. Thomas; (2) severing approximately one hundred pieces of rebar and attached concrete from the stern of Witconcrete II and dropping it into Krause Lagoon; and (3) conducting sandblasting operations on a floating barge that projected sand and paint chip residue into Krum Bay. The Clean Water Act generally prohibits discharging pollutants into the navigable waters of the United States without a permit. But it only regulates "discharges" of pollutants from a "point source." See *33 U.S.C. §§ 1311*(a) and 1362(12).[8] Defendants contend as a matter of

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[8] 33 U.S.C. § 1311 (a) provides: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

33 U.S.C. § 1362(12) provides: "The term 'discharge of a pollutant' and the term 'discharge of pollutants' means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the

(continued...)

law their conduct did not constitute discharge of a pollutant from a point source. We review questions of statutory interpretation de novo. *United States v. Schneider, 14 F.3d 876 (3d Cir. 1994).*

Barges are "floating craft," expressly included within the definition of "point source." *33 U.S.C. 1362*(14).[9] "Discharges" include "any addition of any pollutant to navigable waters from any point source." Defendants concede that Krum Bay and Krause Lagoon are navigable waters of the United States. Rebar, concrete, sand and paint chips fall within the Clean Water Act's broad definition of "pollutant." *33 U.S.C. § 1362*(6).[10] Therefore, cutting off pieces of a ferro-concrete barge and dumping them in Krum Bay and Krause Lagoon, or conducting sandblasting on a floating craft and

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[8](...continued)
contiguous zone or the ocean from any point source other than a vessel or other floating craft."

[9] 33 U.S.C. § 1362(14) provides: "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. The term does not include agricultural stormwater discharges and return flows from irrigated agriculture."

[10] 33 U.S.C. § 1362(6) provides, in part: "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

allowing the residue to fall into Krum Bay, constitutes making an addition of a pollutant to navigable waters of the United States from a point source. Defendants' conduct fell within the applicable statutory definitions.

Appellants' reliance on *United States v. Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993),* cert. denied, *512 U.S. 1245 (1994),* does not alter our conclusion. There, defendant removed containers loaded with blood vials from his office, transported them in his car, and carried them to the Hudson River, where he deposited them during low tide in a bulkhead separating his home from the river. The United States Court of Appeals for the Second Circuit refused to consider defendant a "point source." But Plaza offers no guidance here because it focused almost exclusively on the application of the Clean Water Act to human beings:

As the parties have presented the issue to us in their briefs and at oral argument, the question is 'whether a human being can be a point source.'

* * *

Human beings are not among the enumerated items that may be a 'point source' . . . . if every discharge involving humans were to be considered a 'discharge from a point source.' the statute's lengthy definition of 'point source' would have been unnecessary.

* * *

The Clean Water Act generally targets industrial and municipal sources of pollutants, as is evident from a perusal of its many sections . . . . The legislative history of the CWA . . . confirms the act's focus on industrial polluters.

* * *

We find no suggestion either in the act itself or in the history of its passage that congress intended the CWA to impose criminal liability on an individual for the myriad, random acts of human waste disposal, for example, a passerby who flings a candy wrapper into the Hudson River, or a

urinating swimmer. Discussions during the passage of the 1972 amendments indicate that congress had bigger fish to fry.

Id. at 647 (citations omitted). Congress intended a broad definition of "point source:" "the concept of a point source was designed to further this [regulatory] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979).* Plaza properly circumscribed the breadth of the "point source" definition that the rebar was actually part of the Witconcrete II and does not alter the analysis. Before and after the severance of the rebar, the Witconcrete II qualified as a "vessel or other floating craft" within the parameters of *33 U.S.C. § 1362*(14). The deliberate amputation of a portion of the vessel did not destroy the Witconcrete II's suitability as a "point source." Cf. *Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs., 917 F. Supp. 251, 257 (S.D.N.Y. 1996)* ("it would seem unlikely that Building 15 would fit into this interpretation of point source as any discharge of material would not be deliberate or systematic"). We see no error here.

B.

Defendants were also convicted for discharging untreated sewage into Krum Bay from a barge used to house their workers, in violation of *33 U.S.C. §§ 1311*(a) and 1319(c)(2)(A).[11] Defendants correctly argue and the

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[11] 33 U.S.C. § 1311(a) provides: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Section 1319(c)(2)(A) provides for criminal sanctions for "any person" who "knowingly" violates § 1311.

government concedes that "sewage from vessels" is regulated under *33 U.S.C. § 1322,* not §§ 1311 and 1319. Thus, if defendants' barge falls within the statutory definition of "vessel," the conduct in question does not violate § 1311(a) and § 1319(c)(2)(A) and their convictions must be reversed. Defendants maintain their barge on which they housed Filipino workers is a vessel. We disagree.

33 U.S.C. § 1322(a)(1) defines "new vessel" and "existing vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." This definition contrasts vessels with "other floating craft," a term which the Clean Water Act does not define, but which suggests by its terms and in the context of the statute an artificial water-borne contrivance that, in contrast to a vessel, is not used or capable of being used for transportation purposes. See *33 U.S.C. § 1362*(12). At all relevant times, the barge in question was moored permanently to shore. It was used to house foreign workers, not as a means of transport. Nor could the barge have been used for transport. According to testimony at trial, defendants' barge was half submerged in the water of Krum Bay, with part of the hull resting on the bottom and with water visible below decks. The barge could not be moved from its mooring. There was sufficient evidence therefore for the trier of fact to conclude that the barge was not a vessel within the meaning of the Clean Water Act.

Though we are not aware of any authority interpreting the meaning of "vessel" under § 1322, our view is in accord with long-standing interpretation of the term "vessel" in other contexts. See *Cope v. Vallette Dry-Dock Co., 119 U.S. 625, 30 L. Ed. 501, 7 S. Ct. 336 (1887)* (dry dock attached to shore by large chains, with no means of propulsion, and incapable of being used for navigation, not a vessel; "The fact that it floats on the water does not make it a ship or vessel."); *Kathriner v. UNISEA, Inc., 975 F.2d 657 (9th Cir. 1992)* ("Floating

structures are not classified as vessels in navigation if they are incapable of independent movement over water, are permanently moored to land, have no transportation function of any kind, and have no ability to navigate.").

C.

33 U.S.C. § 1319(c)(2)(A) establishes criminal penalties for anyone who "knowingly" violates *33 U.S.C. § 1311.* Defendants contend the district court erred when it failed to instruct jurors on the definition of "knowingly," arguing that jurors might have been unaware that an accidental discharge of pollutants was insufficient to convict. Defendants did not raise this objection at trial, so we review for plain error.

Despite defendants' contention, the court instructed jurors on the meaning of the term "knowingly." It stated: "An act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. The purpose of adding the word 'knowingly' is to insure that no one will be convicted for an act done because of mistake, accident, or other innocent reason." There was no error here.

D.

Defendants were convicted for violating the Rivers and Harbors Act, *33 U.S.C. § 403,* which provides, in part:

it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in . . . any water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.

Defendants contend the district court should have dismissed this count because the government "did not prove that the

Defendants had knowingly built a pier, wharf, or any other structure."

Under longstanding precedent, the prohibition on "building or commencing the building of any wharf, pier . . . or other structures" contained in § 403 contemplates "the purposeful creation of something formulated or designed, construction work in the conventional sense." *United States v. Bigan, 274 F.2d 729, 732 (3d Cir. 1960).* Thus, we have held that negligent creation of an obstruction to navigation does not violate § 403. See id. (negligently caused land slide resulting in blocked river channel not a violation of § 403).

At trial, the government presented evidence that defendants intentionally strung together numerous derelict barges to form a permanent dock for loading activities, repairs, and the housing of employees. West Indies Transport permanently attached these barges together and to land with rope and wire cable. The barges and shore were connected by walkways defendants constructed out of metal and wood. The resulting wharfs were wired for electricity and were substantial enough to support significant loading and repair operations, including the use of forklifts. This evidence provided sufficient basis that defendants purposefully built an unauthorized structure. This was not a case where an act of nature or negligence resulted in an obstruction to navigation. It was clear that defendants here intentionally built a large dock to conduct their business activities.[12]

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[12] Consistent with the United States Supreme Court's directive to interpret 33 U.S.C. § 403 broadly, courts have considered structures analogous to the barges at issue in the instant case "obstructions." See *United States v. Republic Steel Corp., 362 U.S. 482, 487, 4 L. Ed. 2d 903, 80 S. Ct. 884 (1960)* ("the Court . . . gave the concept 'obstruction' . . . a

(continued...)

E.

Defendants raise a second objection to their convictions under *33 U.S.C. § 403*, the Rivers and Harbors Act. *33 U.S.C. § 403* sanctions the construction of structures in water of the United States only when those structures are built "outside established harbor lines, or where no harbor lines have been established." *33 U.S.C. § 403*. The district court did not instruct the jury that it must find defendants built a structure outside harbor lines, or where no lines have been established. Although

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[12](...continued)
broad sweep"), reh'g denied, *363 U.S. 858, 4 L. Ed. 2d 1739, 80 S. Ct. 1605 (1960); Norfolk & W. Co. v. United States, 641 F.2d 1201, 1210 (6th Cir. 1980)* (" 'obstruction' within the meaning . . . of the Act is to be liberally construed"). Examples of like structures which constitute "obstructions" include docks, piers, boat ramps, and sunken vessels. See *Great Am. Ins. Co. v. Tugs "Cissi Reinauer" et al., 933 F. Supp. 1205, 1219 (S.D.N.Y. 1996)* (finding a houseboat, that served as a residence and was not moved for more than seven months, constituted a "permanently moored vessel" and an "unauthorized riparian 'obstruction' " for purposes of § 403) (citations omitted); *United States v. Lambert, 915 F. Supp. 797, 804 (S.D.W. Va. 1996)* ("the dock and its extension are 'structures' that obstruct the navigable capacity of the River. The River's normal flow and circulation patterns have been disrupted also"); *Fox Bay Partners v. United States Corps of Engineers, 831 F. Supp. 605, 608 (N.D. Ill. 1993)* ("the construction of docks, piers, and boat ramps creates obstructions in the navigable waters of the United States"); *United States v. Ohio Barge Lines, Inc., 432 F. Supp. 1023, 1027 (E.D. Pa. 1977)* ("[a] barge, whether negligently or intentionally sunk in a navigable river of the United States, to further the purpose of the Act and not narrow it . . . [is included] as an obstruction").

defendants now contend on appeal the jury instruction was fatally deficient, their proposed jury instruction made no mention of the "harbor lines" element. "Thus, if there was any error at all, it was 'invited error' and cannot now be a basis for reversal." *United States v. Console, 13 F.3d 641, 661 (3d Cir. 1993)* (quoting *Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975)).*

If not invited error, we would review for plain error because defendants did not object at trial. A plain error must be "prejudicial" -- "It must have affected the outcome of the district court proceedings." *Olano, 507 U.S. at 734; United States v. Turcks, 41 F.3d 893 (3d Cir. 1994)* (same). Defendants bear this burden of proof. Id.

Defendants have not brought to our attention any evidence suggesting that the district court's instruction affected the outcome of the trial. West Indies Transport has not argued, at trial or on appeal, that its docks were in fact constructed within established harbor lines, or where no lines have been established. On the contrary, defendants appear to concede this issue. Nor do defendants contend that a reasonable jury might have acquitted them on this charge had it been instructed on the harbor lines requirement. We see no indication that the district court's jury instruction had any impact on the outcome of the trial. For these reasons and because the district court followed the defendants' proposed instruction, the court's instruction did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Therefore we see no plain error.

IV. Alleged Prejudicial Testimony

Randolph Allen, a local labor official, testified for the government regarding the costs defendants would have incurred had they employed workers through legal means. Defendants

objected to his testimony on the ground that it was unduly prejudicial and irrelevant. The district court allowed Allen's testimony as probative of defendants' motive and intent to commit visa fraud.

After the conclusion of Allen's testimony defendants asked for a mistrial, citing possible prejudice among union workers on the jury against someone who employed alien labor. Defendants also asked the court to question the jury for possible prejudice. Denying the motion for mistrial, the court noted that defendants failed to raise this question with potential jurors during pre-trial voir dire. Nevertheless, the district court halted the trial and asked the jurors whether any of them had "such strong feelings for or against alien workers" that they would not be able "to decide this case fairly and impartially." No juror responded affirmatively.

We review denial of mistrial for abuse of discretion. *United States v. Wright-Barker, 784 F.2d 161, 175 (3d Cir. 1986).* Allen's testimony was relevant to and probative on the intent element of the charged visa fraud counts because it tended to establish the defendants' motive. We see no sign of undue prejudice. Though the defendants did not raise this issue during voir dire, the district court carefully questioned the jury to ensure there was no prejudice that might affect the jury's impartiality. We see no abuse of discretion here.

V. Entrapment by Estoppel

Defendants contend they were denied a fair trial when the district court prevented them from presenting evidence relevant to, and failed to instruct the jury on, two "entrapment by estoppel" defenses.

A.

The affirmative defense of entrapment by estoppel has its

roots in two Supreme Court decisions, *Raley v. State of Ohio, 360 U.S. 423, 3 L. Ed. 2d 1344, 79 S. Ct. 1257 (1959)* and *Cox v. State of Louisiana, 379 U.S. 559, 13 L. Ed. 2d 487, 85 S. Ct. 476 (1965)*, reh'g denied, *380 U.S. 926, 13 L. Ed. 2d 814, 85 S. Ct. 879 (1965)*, finding violations of due process. In Raley, defendants refused to answer questions of the Ohio Un-American Activities Commission after a state official erroneously informed them that they were protected under the state constitution's privilege against self-incrimination. The defendants were subsequently held in contempt. The Supreme Court reversed, holding that the state may not "convict[ ] a citizen for exercising a privilege which the state clearly had told him was available to him," for to do so "would be to sanction the most indefensible sort of entrapment." *360 U.S. at 438.* The Court applied the doctrine again in Cox, where it reversed state law convictions for picketing because a state official had granted defendants permission to picket.

We have applied the entrapment by estoppel defense in only one prior decision, *United States v. Pennsylvania Industrial Chemical Corp., 461 F.2d 468 (3d Cir. 1972)*, modified and remanded, *411 U.S. 655 (1973)*. In Pennsylvania Industrial, the defendant was charged with discharging pollution into the Monongahela River, in violation of the Rivers and Harbors Act, *33 U.S.C. § 407*. At trial, the defendant sought to present evidence that its allegedly criminal acts had been authorized by Army regulations and the federal government's long-term interpretation of the statute. The district court prohibited the defendant from introducing the evidence and refused to instruct a jury that the defendant should be acquitted if his actions resulted from affirmative government representations that its acts were lawful.

Citing due process grounds, we reversed on appeal. "The concept of fair play is implicit in our basic notions of what is meant by due process of law. In this regard, an individual or corporation should not be held criminally responsible for

activities which could not reasonably have been anticipated to be illegal based on 70 years of consistent government interpretation and subsequent behavior." *Id. at 479.* Because the defendant had not been allowed to present the evidence nor had the jury been instructed on the entrapment by estoppel defense, we granted a new trial. Id.

The Supreme Court agreed with our statement of the law, holding "it was error for the District Court to refuse to permit PICCO to present evidence in support of its claim that it had been affirmatively misled into believing that the discharges in question were not a violation of the statute." *United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 675, 36 L. Ed. 2d 567, 93 S. Ct. 1804 (1973).* The Court also held that the defense applied only where there is reliance in fact and that reliance was reasonable under the circumstances. Id.

Since Pennsylvania Chemical was decided, other courts of appeals, citing the due process clause, have applied the entrapment by estoppel defense, although employing slightly different tests. See, e.g., *United States v. Rector, 111 F.3d 503, 506-07 (7th Cir. 1997)* (entrapment by estoppel defense applies where "the one misleading the defendant be an official of the state; that he actively mislead the defendant; and that the defendant's reliance be actual and reasonable in light of the identity of the agent, the point of law represented, and the substance of the misrepresentation"; additionally, defendant's reliance must be in good faith); *United States v. Aquino-Chacon, 109 F.3d 936, 938 (4th Cir. 1997)* ("A criminal defendant may assert an entrapment-by-estoppel defense when the government affirmatively assures him that certain conduct is lawful, the defendant thereafter engages in the conduct in reasonable reliance on those assurances, and a criminal prosecution based upon the conduct ensues."); *United States v. Trevino-Martinez, 86 F.3d 65, 69 (5th Cir. 1996)* ("criminal defendant may be entitled to raise a defense of entrapment by estoppel only when a government official or agent actively

assures a defendant that certain conduct is legal and the defendant reasonably relies on that advice and continues or initiates the conduct") (internal quotations omitted), cert. denied, *117 S. Ct. 1109 (1997); United States v. Brebner, 951 F.2d 1017, 1024 (9th Cir. 1991)* ("The entrapment by estoppel defense applies when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official."); *United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991)* ("Entrapment by estoppel has been held to apply when an official assures a defendant that certain conduct is legal, and the defendant reasonably relies on that advice and continues or initiates the conduct."). These courts agree that reasonable reliance means a defendant must establish that "a person truly desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *Trevino-Martinez, 86 F.3d at 69; Brebner, 951 F.2d at 1024.*

We hold the entrapment by estoppel defense applies where the defendant establishes by a preponderance of the evidence that (1) a government official (2) told the defendant that certain criminal conduct was legal, (3) the defendant actually relied on the government official's statements, (4) and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement.[13]

B.

At trial, defendants sought to raise two entrapment by estoppel defenses. First, they wished to present testimony from

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[13] The defendant's reliance is reasonable and in good faith only where a person truly desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

certain West Indies Transport employees and INS agents. Defendants claimed the testimony would show that they had fully informed INS that they wanted to employ foreign nationals admitted to the United States on D-1 crewman visas as dockworkers at their facility, and that INS had approved of the scheme.

The district court held that "to establish entitlement to the defense of entrapment by estoppel . . . defendants must show (1) that after fully informing government officials with actual or apparent authority of the underlying facts, they were advised that the alleged conduct was legal; (2) that they relied on that advice; and (3) that reliance was reasonable, and given that reliance, prosecution would be unfair." After holding an in camera hearing to review the proffered evidence, the district court concluded defendants' evidence demonstrated only that INS extended the Filipino workers' visas based on representations by West Indies Transport that the workers would soon be employed as crewmen on ocean-going vessels. The evidence also showed that defendants never informed any United States officials at any time that the workers would be living on United States soil and that they would work as dock workers on derelict barges and on land. For these reasons, the district court held that defendants had offered no evidence tending to prove that the INS was informed of and approved defendants' scheme to employ alien workers admitted to the United States on D-1 foreign crewman visas as permanent dockhands.[14]

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[14] The district court said: "The proffered testimony has led me to conclude that no comments by a government agency can be construed as indicating to defendants that their conduct was legal, when no government official was ever informed as to the specifics of the given situation. Because defendants failed to inform any government authority of the facts which are

(continued...)

As the district court correctly observed, defendants pointed to no evidence tending to prove that the INS was informed of and approved defendants' scheme to employ alien workers admitted to the United States on D-1 foreign crewman visas as permanent dockhands. Defendants have failed to establish a necessary element of the defense -- that government officials told them that their conduct was lawful. For that reason, the district court correctly excluded the proffered evidence.

C.

The second entrapment by estoppel claim arises out of defendants' convictions under the Ocean Dumping Act, *33 U.S.C. §§ 1411*(a) and 1415(b)(1). Defendants were convicted for dumping large quantities of scrap metal and other debris into the ocean under cover of darkness, without a permit. Coast Guard regulations implementing the Act to Prevent Pollution from Ships, *33 U.S.C. § 1901*-11, require all vessels 26 feet and longer to carry placards that warn vessel owners and crews that certain discharges of ship-generated garbage and sewage are prohibited at various distances from shore. At trial, defendants argued that the placards led them to believe that they could legally dump scrap metal into the ocean so long as the dump site was at least twelve miles offshore. The district court allowed them to present their evidence, but did not instruct the jury on the entrapment by estoppel defense.[15]

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[14](...continued)
relevant to obtaining the visas, they could not have obtained or relied upon any advice indicating that their conduct with regard to the information provided on the visa applications was legal. Thus the entrapment by estoppel defense is not available to the defendants in this case."

[15] We cannot ascertain from the defendants' brief or appendix whether the defendants requested such an instruction.

Defendants contend their reasonable reliance on these signs absolved them of criminal responsibility under the doctrine of entrapment by estoppel. In the alternative, they contend the failure to instruct on the entrapment by estoppel defense violated their due process rights.

Defendants have included in the appellate record examples of placards similar to those on which they claimed they relied when they believed their dumping operations were legal. One example, apparently produced by the Coast Guard, states that certain types of "nonplastic trash" may be discharged at sea if the vessel is at least twelve nautical miles from shore. The placard makes no representations about scrap metal. It also states, in clear type: "The information contained on this device is provided as a guidance to many, but not all, of the discharge restrictions which apply under United States law. There are a number of discharge restrictions which are not set out in this device."

Defendants were not entitled to an entrapment by estoppel instruction on the strength of this placard. The placard makes no representations about the legality of defendants' conduct -- dumping scrap metal off-shore. The placard expressly states that other discharge restrictions may apply, putting defendants on notice to make further inquiries to determine whether their conduct was legal. Nor would it have been reasonable for defendants to rely on this placard as an authorization to dump scrap metal off-shore. Large quantities of scrap metal generated by a ship repair facility do not fall within the plain meaning of "non-plastic trash." Moreover, there is substantial evidence that the defendants' claimed reliance was neither actual nor in good faith. Had West Indies Transport truly believed that its ocean dumping was legal, it would not have consistently dumped scrap metal under cover of darkness.

The second example placard submitted by the defendants was manufactured by "Seachoice Products," apparently a

private ship chandler. The entrapment by estoppel defense applies only to representations made by government officials, not to asserted reliance on legal advice or representations from non-governmental actors. Representations made by Seachoice Products or any other private entity as to the legality of ocean dumping cannot remotely establish a valid entrapment by estoppel defense. Even if the placard contained representations by the government, it would not warrant the defense, for the placard contains no statements regarding the legality of dumping scrap metal at sea.

No government official ever told West Indies Transport its dumping operations were legal. Nor does it appear from the record that West Indies Transport ever asked the government for advice on this matter. Defendants were experienced operators in the maritime industry. It was clearly unreasonable for defendants to rely on a placard that appears on all types of vessels, including recreational boats, as legal justification for industrial ocean dumping.

VI. Racketeering and Conspiracy

Defendants assert if we reverse their convictions on the immigration and environmental crimes counts, we must reverse their convictions for conspiracy and racketeering. Because we affirm defendants' convictions for visa fraud and environmental violations, we will affirm these convictions as well.

Defendants also contend their racketeering convictions must be overturned because none of the predicate acts was a local Virgin Islands offense. The Virgin Islands RICO statute, 14 V.I.C. § 604, requires only that at least one predicate act charged as a federal offense also "constitute" a felony under Virgin Islands law. 14 V.I.C. § 604(j)(2)(C). But, the one requisite local predicate act need not be charged as a local felony, but merely "constitute" one. Here, defendants were charged with and convicted for conspiracy under federal law.

Conspiracy also constitutes a felony under the Virgin Islands Code. See 14 V.I.C. § 551. We see no error here.

VII. Sentencing

Defendants raise several sentencing objections.

A.

First, defendants contend that the $500,000 fine imposed by the district court under the Corrupt Organizations Act, 14 V.I.C. § 605, was excessive. We review the district court's determination of the amount of a fine for clear error. *United States v. Seale, 20 F.3d 1279, 1284 (3d Cir. 1994).* The defendants concede the fine falls within the range permitted by law. Nor have defendants pointed to any legal or factual error underlying the assessment of a fine in this amount. We see no error here.

B.

Defendants also contend the six level enhancement for ongoing, continuous, or repetitive discharge of a pollutant assessed by the district court under U.S.S.G. § 2Q1.3(b)(1)(A) should be reduced because the raw human sewage defendants dumped into navigable waters was "fully biodegradable." Our review is plenary. *United States v. James, 78 F.3d 851* (3d Cir.), cert. denied, *136 L. Ed. 2d 77, 117 S. Ct. 128 (1996).*

Defendants cite no authority for the proposition that untreated human sewage or fully biodegradable pollution warrants different treatment under the guidelines than other pollutants, nor any reasons why we should adopt such a rule. Because untreated human sewage falls within the clear meaning of "pollutant" under § 2Q1.3(b)(1)(A), we will affirm the enhancement.

C.

The district court ordered defendants to pay restitution to offset the costs of cleaning up their environmental damage. Restitution is authorized only for violations of Title 18 and some Title 49 provisions. See *18 U.S.C. § 3663.* Defendants contend the trial court erred by ordering restitution for title 33 offenses. Our review is plenary. *United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996).*

Defendants' argument is meritless. Each Title 33 offense also charged a violation of *18 U.S.C. § 2.* Restitution is authorized for violation of *18 U.S.C. § 2.*

D.

Defendants also imply, though they do not clearly argue, that the amount of restitution was excessive given the amount of environmental damage caused by their criminal conduct. We review the appropriateness of a particular restitution award for abuse of discretion. *United States v. Maurello, 76 F.3d 1304 (3d Cir. 1996).* The district court calculated restitution based on Coast Guard estimates of the costs required to clean defendants' environmental damage. The district court also ordered that if the ultimate cost of the clean-up is lower than the Coast Guard estimate, any amount over the actual costs shall be returned to the defendants. This sensible approach appears appropriate and does not constitute an abuse of discretion.

VIII.

For these reasons, the judgments of conviction and sentence will be affirmed.

NYGAARD, Circuit Judge, concurring and dissenting.

I agree with most of the government's argument. Regarding the Clean Water Act charges, I cannot. It is true, of course, that "wrecked or discarded equipment" is a listed "pollutant" under *33 U.S.C. § 1362*(6). Webster's, however, defines "equipment" as "the set of articles or physical resources serving to equip a person or thing . . . ." Webster's Ninth New Collegiate Dictionary 421 (1988). I do not think these parts of the Witconcrete II--which in better times were an integral part of its hull--can properly be thought of as part of the ship's equipment. They were not mere appurtenances, like a loading crane or radar antenna dumped over the side. I believe they were a part of the ship itself.

That aside, however, there still was no "point source" within the meaning of the Act. The Clean Water Act prohibits discharging pollutants into the navigable waters of the United States without a permit; however, it regulates discharges only from "point sources." See *33 U.S.C. §§ 1311*(a), 1362(12). Appellants argue that they cannot be criminally culpable because as a matter of law the discharges above did not emanate from point sources. Under *33 U.S.C. § 1362*(14), "point source" is defined as follows:

"any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

Appellants rely on *United States v. Plaza Health Laboratories, Inc., 3 F.3d 643 (2d Cir. 1993).* There, the defendant owned a medical testing laboratory. He loaded vials of blood into his car and dumped them into the Hudson River. He was indicted under the Clean Water Act. The Court of Appeals, however, ruled that defendant, as an individual dumping waste directly into a body of water, was not a "point

source" within the meaning of the Act and reversed his conviction.

After first observing that "this statute was never designed to address the random, individual polluter," *id. at 646,* the Plaza Health Court looked to the language and structure of the Act and concluded that the listed items in the statute "evoked images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." Id. It then reasoned that an interpretation of the statutory text that brought every act of "discharge involving humans" within the ambit of the term "point source" would make that text redundant, *id. at 646-47,* and thus contrary to long-established principles of statutory construction.

The Court next turned to the legislative history of the Act and found no congressional intent "to impose criminal liability on an individual for the myriad, random acts of human waste disposal, for example, a passerby who flings a candy wrapper into the Hudson River, or a urinating swimmer." *Id. at 647.* Moreover, it found no such expansive interpretation of the Act in the criminal case law, although it noted that courts dealing with this issue in the context of civil penalties have construed the statute more broadly. *Id. at 648.* Finally, the Plaza Health Court found no evidence of any administrative interpretation by the EPA that would bring the defendant's conduct within the statute. *Id. at 649.*

Based on these observations, the Court then concluded "that the term 'point source' as applied to a human being is at best ambiguous." Id. Applying the rule of lenity, it held that the prosecution must be dismissed. Id.

The government relies, however, on *United States v. M.C.C., Inc., 772 F.2d 1501 (11th Cir. 1985),* in which a contractor building a bridge in the Florida Keys departed from the

approved plan and brought construction assemblies in by barge. Unfortunately, the tug's screws stirred up sand from the bottom of a shallow body of water and redeposited it on nearby grass beds, damaging them. The M.C.C. court held that material already in the water, when redeposited, could constitute a discharge under the Clean Water Act. *Id. at 1506.* Without dwelling on the issue, the court concluded that because "vessel" was included in the statutory list of possible point sources, the tug's screws were a point source under the facts of that case. *Id. at 1505-06.*

It is evident to me that when Congress used the term "point source," it had in mind something other than the propulsion system of every ship that happens to operate in navigable waters. I would thus conclude that a point source is the conduit, conveyance or vector by which pollutants are discharged, and not the screws of a vessel stirring up old pollutants without discharging anything at all.

I would not follow M.C.C. for another reason: there, the government sought only civil penalties. Here, we are reviewing a felony conviction, and must apply different maxims of statutory construction. Remedial statutes are typically construed broadly to effectuate the legislative purpose behind them. Criminal statutes are construed more narrowly to give defendants fair warning of the conduct the legislature intended to penalize. I conclude that Plaza Health fits our case particularly well, and would adopt its holding.

I would also conclude that the error here was plain. In *United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993),* the Supreme Court clarified the standard that courts of appeals must employ when deciding whether a forfeited error warrants reversal under Fed. R. Crim. P. 52(b). First, of course, there must be an error that has not been knowingly and intentionally waived. *Id. at 732-33, 113 S. Ct. at 1777.* Second, the error must be plain; that is, clear or

obvious under current law. *Id. at 734, 113 S. Ct. 1777.* Third, the plain error must have affected substantial rights, generally by affecting the outcome of the district court proceedings. *Id. at 734, 113 S. Ct. at 1777-78.* Finally, once this threshold has been crossed, the reviewing court must exercise its discretion, correcting the error if it "seriously affected the fairness, integrity or public reputation of judicial proceedings," *Id. at 736, 113 S. Ct. at 1779* (quoting *United States v. Atkinson, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936)),* as when the error caused the conviction of an "actually innocent defendant." Id. at 736, 113 S. Ct. at 1779.

Turning to this case, the Clean Water Act proscribes only "the discharge of any pollutant," *33 U.S.C. § 1311*(a), which in turn is defined as "any addition of any pollutant . . . from any point source . . . ." *33 U.S.C. § 1362*(12). It is evident that the requirement that the discharge emanate from a point source is an essential element of the crime.

We have held recently that "the omission of an essential element of an offense from the jury instructions usually will be obvious error, and therefore ordinarily satisfies the first and second requirements of Olano." *United States v. Stansfield, 101 F.3d 909, 920 (3d Cir. 1996)* (citation omitted); accord *United States v. Zolicoffer, 869 F.2d 771, 774 (3d Cir. 1989)* ("the failure to prove one of the essential elements of a crime is the type of fundamental error which may be noticed by an appellate court notwithstanding the defendant's failure to raise it in the district court"). Thus, I conclude that to the extent appellants' Clean Water Act convictions rested on the erroneous conclusion that the discharges came from point sources, the error was "plain."[1]

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[1] My conclusion is not altered by the fact that Plaza Health, a Second Circuit case, was not binding in this circuit

(continued...)

I likewise have no difficulty concluding that the error involved appellants' substantial rights and seriously undermined the fairness, integrity and reputation of the judicial proceedings. If the discharges did not emanate from a point source, an issue to which I shall turn shortly, then appellants could not, as a matter of law, have been convicted of Clean Water Act violations, and are "actually innocent" of the offense. Such a conviction would be a classic miscarriage of justice. Accordingly, to the extent there was error, we have the power to correct it and I would exercise our discretion to do so.

I believe that neither the discharge of the Witconcrete II's stern nor its protruding rebar qualifies as a point source within the meaning of the Clean Water Act. The severing of the stern was not a discharge from a vessel, as required by *33 U.S.C. § 1362*(14). Rather, a part of the vessel itself was discharged. Appellants merely severed a wrecked, useless portion of the Witconcrete II to extricate a serviceable forward portion of it. This was a salvage operation, not a discharge of concrete and rebar through the instrumentality of the barge.

Likewise, the severed rebar was not discharged through the "conveyance" of the barge, see *33 U.S.C. § 1362*(14), it was part of the barge itself. Put another way, I think these two

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[1](...continued)
at the time of appellants' trial. In United States v. Retos, 25 F.3d 1220, 1230 (3d Cir. 1996), we held that the defendant was entitled, on plain error review, to the benefit of a Supreme Court decision handed down after his trial but before his appeal became final. Here, the law was clear at the time of trial; although not binding in a formal sense, the holding of Plaza Health has not been questioned by any other court facing analogous facts.

discharges are closer to the intermittent, manual blood dumping of Plaza Health than they are to the industrial paradigm of the sewage treatment plant, oil refinery or steel mill that animates most Clean Water Act cases.[2] I would accordingly reverse appellants' convictions at counts one and two.

I also disagree with the government's argument concerning the Rivers and Harbors Act. I rely again on the language of the statute, *33 U.S.C. § 403,* under which it is prohibited "to build or commence the building of any wharf, pier . . . or other structures." In sum, these barges were placed in their current locations by the hurricane, not by WIT. At most, WIT wired them to the local utilities and built some walkways to connect them. That may be the "use" of an existing structure, but it is not the "building" of a new one.

In more detail, appellants had a permit to moor four vessels in Krum Bay as docks. When Hurricane Hugo hit the Virgin Islands in 1989, it ran some of these vessels aground and otherwise shifted their positions from those specified in the permits. After the storm, appellants did not move these vessels back to their original positions, but used them where they sat. By November 1992, the permits had expired. In count three of the superseding indictment, the government charged appellants with misdemeanor violations of the Rivers and Harbors Act, *33 U.S.C. § 403,* which proscribes creating piers and wharves without a permit. Appellants did not challenge the sufficiency of the evidence to support their convictions in the district court, so again the plain error standard applies.

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[2] The government also argues that the stern and rebar became "wrecked and discarded equipment," a listed pollutant under § 1362(6), but that begs the question of whether there was a point source, which I conclude there was not.

Under longstanding precedent, prohibiting "building or commencing the building of any wharf, pier ... or other structures" contained in section 403 contemplates "the purposeful creation of something formulated or designed, construction work in the conventional sense." *United States v. Bigan, 274 F.2d 729, 732 (3d Cir. 1960)* (emphasis added). There, we held that a negligently caused earth slide resulting in an obstruction to a river channel was not a violation of section 403. Likewise, we have held that negligently sinking a vessel in a river channel did not violate the Act. See *United States v. Ohio Barge Lines, Inc., 607 F.2d 624, 629 (3d Cir. 1979);* accord *United States v. Wilson, 235 F.2d 251, 253 (2d Cir. 1956)* (a sunken barge may be an "obstruction," but is not a "structure" in violation of § 403).

Here, appellants had every right to moor vessels in Krum Bay, but the hurricane shifted them out of position. Appellants, however, never purposely put the vessels in their current positions and hence never built any structure in violation of the Act. Because, as I have discussed supra, the government utterly failed to adduce evidence supporting an essential element of the crime, I would deem the error plain and exercise our discretion to correct it under Fed. R. Crim. P 52(b). Accordingly, I would reverse the convictions at count three.

A True Copy:
Teste:

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-7063, 96-7064
and 96-7065

UNITED STATES OF AMERICA

v.

WEST INDIES TRANSPORT, INC.,
Appellant at No. 96-7063

WIT EQUIPMENT CO., INC.,
Appellant at No. 96-7064

W. JAMES OELSNER
Appellant at No. 96-7065

On appeal from the District Court of the Virgin Islands
Division of St. Croix
(D.C. Criminal Nos. 93-cr-00195-1,
93-cr-00195-2 and 93-cr-00195-3)

Present: SCIRICA, NYGAARD, and McKEE, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the

District Court of the Virgin Islands and was argued by counsel December 9, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of conviction and sentence of the said District Court entered January 8, 1996, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST

/s/
Clerk

Dated: October 15, 1997

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-7063, 96-7064
and 96-7065

UNITED STATES OF AMERICA

v.

WEST INDIES TRANSPORT, INC.,
Appellant at No. 96-7063

WIT EQUIPMENT CO., INC.,
Appellant at No. 96-7064

W. JAMES OELSNER
Appellant at No. 96-7065

(D.C. Crim. Nos. 93-cr-00195-1,
93-cr-00195-2 and 93-cr-00195-3)

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS and McKEE, Circuit Judges.

The petition for rehearing filed by appellants in the

above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/

_____

Circuit Judge

Dated: NOV 12 1997

cc: T.M.
D.A.
K.H.